



**IN THE INCOME TAX APPELLATE TRIBUNAL,  
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER  
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

**ITA No.301/CTK/2019: Assessment Year : 2015-16  
ITA No.31/CTK/2020: Assessment Year : 2014-15**

Asst. Commissioner of Income Tax, Circle-2(1), Cuttack	Vs.	Shashi Kala Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack
PAN/GIR No.AASPA 3699 R		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**C.O.No.4/CTK/2020: Asst. Year: 2014-15  
(in ITA No.31/CTK/2020)**

Shashi Kala Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack	Vs.	Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
PAN/GIR No. AASPA 3699 R		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**ITA No.302/CTK/2019: Assessment Year : 2015-16  
ITA No.30/CTK/2020: Assessment Year : 2014-15**

Asst. Commissioner of Income Tax, Circle-2(1), Cuttack	Vs.	Santosh Kumar Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack
PAN/GIR No.AASPA 3698 Q		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**C.O.No.3/CTK/2020: Asst. Year: 2014-15  
(in ITA No.30/CTK/2020)**

Santosh Kumar Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack	Vs.	Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
PAN/GIR No. AASPA 3698 Q		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**ITA No.303/CTK/2019: Assessment Year : 2015-16**  
**ITA No.29/CTK/2020: Assessment Year : 2014-15**

Asst. Commissioner of Income Tax, Circle-2(1), Cuttack	Vs.	Aswin Kumar Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack
PAN/GIR No.AISPA 7337 C		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**C.O.No.2/CTK/2020: Asst. Year: 2014-15**  
**(in ITA No.29/CTK/2020)**

Aswin Kumar Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack	Vs.	Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
PAN/GIR No. AISPA 7337 C		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**ITA No.32/CTK/2020: Assessment Year : 2015-16**

Asst. Commissioner of Income Tax, Circle-2(1), Cuttack	Vs.	Saurav Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack
PAN/GIR No.AHGPA 9377 F		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

**C.O.No.5/CTK/2020: Asst. Year: 2014-15**  
**(in ITA No.32/CTK/2020)**

Saurav Agarwal, Plot No.1554/B,Sector-6, Behind DAV Public School, Bidanasi, Cuttack	Vs.	Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
PAN/GIR No. AHGPA 9377		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri Mohit Kumar Sheth, AR  
Revenue by : Shri S.C.Mohanty, Addl CIT (DR)

**Date of Hearing : 30 /5/ 2022**  
**Date of Pronouncement : 30 /5/2022**

## **ORDER**

### **Per Bench**

These are appeals filed by the assesseees against the separate orders of the CIT(A) Cuttack in appeal No.0302/2017-18 for the assessment year 2015-16 & in Appeal No.0506/16-17 for A.Y 2014-15 in the case of Smt. Sashi Kala Agarwal, in IT Appeal No.0301/2017-18 for the A.Y. 2015-16, and in I.T.Appeal No.0508/2016-17 for the A.Y. 2015-15 in the case of Santosh Kumar Agarwal, in I.T.Appeal No.0306/2017-18 for A.Y. 2015-16 and in I.T.Appeal No.0516/16-17 for the A.Y. 2014-15, in the case of Ashwin Kumar Agarwal and in I.T.Appeal No.0514/2016-17 for the A.Y. 2014-15 in the case of Saurav Agarwal, respectively.

2. The cross objections filed by the assessee in revenue's appeals in ITA No.31/CTK/2020, ITA No.30/CTK/2020, ITA No.29/CTK/202 and ITA No.32/CTK/2020 for the assessment year 2014-15 in respect of different assesses.

3. Shri S.K.Mohanty, Addl. CIT (DR) appeared on behalf of the revenue and Shri Mohit Kumar Sheth, Id AR appeared on behalf of the assesses.

4. The appeals filed by the revenue for the assessment year 2014-15 in the case of above named assesses are delayed by 141 days. The revenue has filed condonation petitions dully supported by affidavits, stating therein that due to pre-occupation with time barring assessment proceedings, the

appeal proposal could not be processed on time and further more the Pr. CIT, Cuttack who is the approving authority, holding dual charges of Pr. CIT, Sambalpur, have huge workload, there was delay of 141 days in filing the appeals. It is also stated that the delay in filing the appeals is neither intentional nor deliberate. Hence, it was prayed to condone the delay of 141 days in filing the appeals in respect of assesses to which, Id AR had no objection. In view of above, we condone the delay of 141 days in filing the appeals for the assessment year 2014-15 and admit the appeals for adjudication.

5. It was submitted by Id SR DR that there was only a single issue involved in all the appeals filed by the revenue, which was against the action of the Id CIT(A) in deleting the addition representing the disallowance of claim of exemption u/s.10(38) of the Act in respect of long term capital gain on the purchase and sale of shares of Kailash Auto Finance Ltd., (KAFL) and GCM Securities. Ld Sr DR drew our attention to the assessment order, wherein, the statement of entry operators and the Directors of the alleged bogus share companies were extracted. It was further submission that the brokers and the entry operators had specifically admitted in their statement that the transaction on the shares of two companies were, in fact, bogus entry transactions and the cheques were issued in respect of purchase and sale of shares of the said companies by receiving cash in advance. It was further submission of Id Sr DR that there

was a survey on the premises of M/s. Sonthalia Rice Mill Group, wherein assessee's group was involved and in the course of statement recorded u/s.131A, the assessee had offered income from the long term capital gains generated on the sale of shares of KAFL and GCM Securities under the head "income from other sources". It was the submission that the assessee had also filed a confirmation letter to the effect. It was his submission that while filing the return of income, the assessee did not disclose said transaction and income therefrom under the head "income from other sources" but had proceeded to offer the same under the head " long term capital gains" and had claimed exemption u/s.10(38) of the Act. It was submission that the AO had on the basis of the statement recorded from the brokers and the entry operators treated the assessee's income from the purchase and sale of shares of both the companies i.e. KAFL and GCM Securities as the unexplained income of the assessee under the head " income from other sources" It was submission that the Id CIT(A) on the ground that the statement of the brokers and entry operators had not been given to the assessee for cross examination and on the ground that Co-ordinate Benches of the Tribunal of the ITAT Kolkata in the case of Shri Manish Kumar Baid vs ACIT in ITA No.1236/Kol/2017 for A.Y. 2014-15 and others had held that the assessee's were entitled to the exemption of the long term capital gain u/s.10(38) of the Act in respect of sale of shares of KAFL and GCM Securities had deleted the addition made in the case of the

assessee. It was submission that the assessee had offered the income from the transaction of purchase and sale of shares of both KAFL and GCM Securities in statement recorded u/s.131A of the Act and filed confirmation thereof. Ld CIT (A) ought not to have deleted the addition on the ground that the statements of the brokers and the entry operators had not been given to the assessee for cross examination. It was further submission that the Ld CIT(A) erred in assuming that the statement had been recorded u/s.133A whereas, in fact, the statement had been recorded u/s.131A of the Act. It was submission that in the event that the Tribunal is not willing to accept the stand of the revenue that the assessee is not entitled to the claim of exemption u/s.10(38) of the Act, then the alternative prayer that the income therefrom is liable to be assessed under the head "adventure in the nature of trade" in so far as the assessee has entered into the new transaction in dealing with bogus shares. It was further alternative prayer that as the original shares in the case of KAF Ltd., representing the CPAL had merged with KAF Ltd., the date of acquisition of the original shares of Careful Projects Advisory Ltd. (CPAL) cannot be considered for the claim of exemption u/s.10(38) of the Act in so far as on account of merger, the shares of CPAL got extinguished and does not exist. It was prayer that the order of the Ld CIT(A) in all the cases is liable to be reversed. Ld SR DR vehemently supported the order of the Assessing Officer.

5. In the revenue's ground in Ground No.5, the revenue has placed the 12 decisions being as follows:

- i) CIT vs Sanghamitra Bharali, 361 ITR 481 (Gau)
- ii) Sanjay Bhimlchand Jain vs Pr. CIT, 89 TAXMANN.COM 196 (Bom)
- iii) Udit Kalra vs ITO, (ita No.220/2019)
- iv) Purviben Snehalbhai Panchhigar vs ACIT (2018) 409 ITR 1254 (Guj)
- v) Ratnakar M Pujari vs ITO (ita No.995/Mum/2012) order dated 9.5.2016
- vi) Pooja Ajmani vs ITO (ITA No.57154/Del/2018) dt.25.4.2019
- vii) Sanat Kumar vs ACIT (ITA No.1881/Del/2018)
- viii) Abnhimanyu Soin vs ACIT (ITA No.951/Ch/2016) dated 18.4.2018
- ix) Shri Satish Kishore vs ITO(Iita No.1704/Del/2019) dt.6.9.2019
- x) Mrs Vaidya Reddy vs ITO (ITA No.2016 /Chny/2017) dt.15.5.2018
- xi) Rajnish Agarwal and Sons (HUF) vs ITO in ITA No.1415/Chny/2018 dt.6.12.2018
- xii) Anip Rastogi and Anju Rastogi vs ITO (ITA No.3809 and 3810/Del/2018)

6. Though the revenue has cited case laws but none of them are discussed nor shown as to how they had relevance in the facts of the assessee's case.

7. In reply, Id AR vehemently supported the order of the Id CIT (A). It was his submission that the assessee is dealing in other shares also to

which he drew our attention to page 27 of Paper Book, which is copy of Demat Account, where holding of shares of CPAL and other cases etc were shown. It was submission that the assessee held shares in other companies such as Coral Hub Limited, Gujarat NRE Minerals Resources Ltd., JCT Electronics, Nitin Spinners Limited, Purvankara Project Ltd., and The Orissa Minerals Development Company Ltd., etc. It was submission that the statement recorded from the assessee u/s.131A also had not been given to the assessee. It was submission that the Id CIT(A) was right in deleting the addition in view of the fact that under similar circumstances the transaction in the shares of KAFL had been allowed in the case of Shri Manish Kumar Baid (supra), by ITAT Kolkata Benches and reference was also extracted in the order of the Id CIT(A). Similarly, even ITAT Delhi Benches "SMC" in the case of Vidhi Malhotra vs ITO IN ita No.93/Del/2018 for A.Y. 2014-15 and others, the claim of exemption u/s.10(38) in respect of shares of KAFL had been accepted and same has been extracted in the order of Id CIT(A). In respect of cross objection, it was submission of Id AR that same was in support of the order of the Id CIT(A).

8. We have considered the rival submissions. A perusal of the assessment order in the present case clearly shows that there was a survey in the business premises of M/s. Sonthalia Rice Mills Group and the assessee herein are partners in the said Group. In the course of survey, statements have been recorded in respect of share transactions of KAFL as

also IPO in respect of GCM Securities. Copy of the statement was attached with the grounds of appeal filed by the revenue, wherein, in reply to Q. No.12, Shri Ashwin Agarwal has categorically stated that the transaction is not bogus capital gains and he has made profit from the trading of shares, which he also disclosed in the return of income. A perusal of the assessment further shows that though there is partial reference to the statement recorded in the course of survey, the substantial portion of the reasoning for the addition, most specifically, denial of exemption u/s.10(38) of the Act are the statements recorded by the Investigation Wing from the shares brokers and entry operators. Admittedly, the statement has not been given to the assessee for cross examination. Though the revenue has taken the stand that the cross examination could not be given to the assessee, we are unable to agree with the same in so far as if any evidence, in any manner, is to be used against the assessee in the course of an assessment of an assessee, such evidence shall be put to the assessee for his rebuttal and if necessary the cross examination. This is the basic principle of natural justice. Just because an assessee, in the course of statement recorded, agreed to offer income which is otherwise eligible for exemption, it does not mean that the assessee can be compelled to withdraw his claim of exemption or be denied his rightful claim of exemption. An exemption u/s.10(38) of the Act is eligible to an assessee if the criterion required for such exemption is met by the transaction which

has resulted income in the hands of the assessee. This cannot be denied to an assessee just because he has not claimed it nor just because agreed not to claim it. An exemption otherwise is allowable to the assessee cannot be even surrendered by an assessee. What is due to the assessee, it is the duty of the Income Tax Officer to grant to the assessee. An Income Tax Officer is not just revenue collector, he is known as Assessing Officer. He is to assesses the correct income and brings to tax the correct income. It is his duty of assessing the correct income after granting the benefit due to an assessee. For repetition sake, the Income Tax Officer is known as Assessing Authority not a Taxing Authority.

9. Coming to the transaction of the shares dealt by the assessee, it is noticed that the Id CIT(A) has considered the fact that the assessee has received payments through banking channel, the transactions are through Demat account and through a recognized stock exchange and paying securities transaction tax(STT). Thus, all the conditions required for grant of exemption u/s.10(38) stands fully complied with in the case of the assessee in respect of shares of KAFL and GCM Securities. Further perusal of the order of CIT(A) clearly shows that he has followed judicial discipline in following the decisions of Co-ordinate Benches of the Kolkata and Delhi Tribunal in respect of said shares. This being so, the revenue has not been able to point out any specific defect in the order of the CIT(A), which calls for any interference by this Tribunal. In such circumstances, the findings of

the Id CIT(A) stands confirmed. Consequently, the appeals filed by the revenue stand dismissed.

10. Coming to the alternative submission of Id Sr DR that the income from the purchase and sale of shares should be assessed under the head “adventure in the nature of trade”, we are unable to agree in so far as the said transaction is not in the nature of adventure in the nature of trade. The assessee has substantial transaction with other shares and these are only two shares which have been picked up on account of statement recorded by Investigation Wing from brokers and entry operators. Admittedly, their statements have also turned unreliable. In regard to second alternative prayer that the shares of CPAL had merged with KAFL and consequently, the date of acquisition of the original shares of CAPL cannot be considered for the claim of exemption u/s.10(38) of the Act would not hold water in so far as when the CPAL shares were replaced by KAFL, there is no question of extinguishment of any assets. Therefore, the question of extinguishment of shares of CPAL does not happen.

11. The cross objections filed by the assessee, being in support of the orders of the Id CIT(A), also stand dismissed as we have upheld the order of the Id CIT(A) while deciding the appeals of the revenue.

12. In the result, appeals of the revenue and cross objections of the assessee are dismissed.

Order dictated and pronounced in the open court on 30 /5/2022.

Sd/-  
**(Arun Khodpia)**  
**ACCOUNTANT MEMBER**

sd/-  
**(George Mathan)**  
**JUDICIAL MEMBER**

Cuttack; Dated 30 /05/2022  
B.K.Parida, SPS (OS)

**Copy of the Order forwarded to :**

1. The Appellant : The ACIT, Circle-2(1), Cuttack
2. The Respondent. Assesseees
3. The CIT(A)-, Cuttack
4. Pr.CIT-, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

**By order**

Sr.Pvt.secretary  
**ITAT, Cuttack**